

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 80318-8

Court of Appeals No. 34714-8-II

WACHOVIA SBA LENDING, INC., d/b/a
WACHOVIA SMALL BUSINESS CAPITAL,
a Washington corporation,

Plaintiff/Respondent,

v.

DEANNA D. KRAFT, individually,

Defendant/Appellant.

On Appeal from the Superior Court of the State of Washington
In and for the County of Pierce
Superior Court Docket Number 05-2-11846-1

**RESPONDENT'S RESPONSE TO MOTION FOR LEAVE TO
RESPOND, STRIKE PORTIONS OF BRIEF, AND/OR
SUPPLEMENT APPELLATE RECORD**

Alexander S. Kleinberg, WSBA # 34449
Attorney for Respondent

EISENHOWER & CARLSON, PLLC
1201 Pacific Avenue, Suite 1200
Tacoma, WA 98402
Phone: (253) 572-4500
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RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2008 MAY -9 P 3:05
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Respondent Wachovia S.B.A. Lending, Inc., d/b/a Wachovia Small Business Capital, submits Respondent's Response to Motion for Leave to Respond, Strike Portions of Brief, and/or Supplement Appellate Record.

1. The Court Should Supplement The Record With The Parties' Correspondence.

Wachovia has no objection to making the email correspondence between counsel attached as Exhibits A and B to Kraft's Motion for Leave to Respond, Strike Portions of Brief, and/or Supplement Appellate Record ("Motion") part of this record. Wachovia also suggests adding to the record correspondence between the undersigned and Kraft's bankruptcy counsel, Ms. Desa Conniff, which is attached hereto as **Exhibit 1** and **2**. Although this email correspondence does not entirely capture the numerous discussions in March 2006 between the undersigned and Ms. Kraft's two (2) Washington attorneys, Ms. Conniff and Mr. Douglas N. Kiger, Wachovia believes this correspondence will aid the Court in understanding how this case came to be.

Exhibit 1 is email correspondence between Wachovia's attorney and Ms. Conniff dated February 28, 2006 and March 1, 2006. This email correspondence reflects, among other things, that Ms. Kraft was considering filing a chapter 7 bankruptcy in early 2006, Ms. Kraft offered to pay \$16,882.00 to settle this case, and the United States Small Business Administration ("SBA") had "final say" as to whether this offer would be accepted.

Exhibit 2 is a copy of Ms. Conniff's March 23, 2006 letter to Wachovia's counsel. Ms. Conniff states in this letter "on March 17, 2006, Wachovia accepted an offer of \$16,882.00 [from Ms. Kraft] after that offer had been withdrawn." This letter also contains a "new" offer of settlement in the amount of \$5,000.00 and a statement that "[a]ny new complaint filed [by Wachovia against Kraft] will be hotly contested by Ms. Kraft and a request for attorney fees and costs will be renewed by her."

2. Ms. Kraft Revoked Her Settlement Offer Of \$16,882.00 While The SBA Was Considering This Offer And After She Learned Wachovia Did Not Intend To Proceed To Trial On The Scheduled Trial Date.

Taken together, the above-described correspondence reflects Ms. Kraft's decision to revoke her settlement offer of \$16,882.00 after the parties submitted this offer to the SBA and after the parties jointly obtained an appraisal on Ms. Kraft's home. Implicit in this correspondence is Ms. Kraft's refusal to stipulate to the continuance of the parties' trial date while the parties worked toward settling this case and obtaining SBA approval of Ms. Kraft's settlement offer.

Ms. Kraft revoked her offer while the SBA was considering it because Ms. Kraft learned prior to the SBA's acceptance of this offer that Wachovia had decided not to proceed to trial on the scheduled trial date in light of (1) the status of the parties' settlement discussions; (2) the SBA's involvement in the case; (3) Ms. Kraft's financial situation, and her

retention of Ms. Conniff, a bankruptcy attorney; and (4) other good reasons.

The truth is Ms. Kraft sought to exert leverage against Wachovia by trying to get Wachovia's claims against her dismissed with prejudice, as opposed to without prejudice, after she learned Wachovia did not intend to try this case on the scheduled trial date. Ms. Kraft took this aggressive approach after she learned Wachovia planned on dismissing the underlying action in part because it had not yet heard back from the SBA as to whether the SBA would accept Kraft's settlement offer of \$16,882.00. Even Ms. Kraft implicitly acknowledges this chain of events in her Motion by stating she "revoked her settlement offer on March 16, 2006 when she found out Wachovia was dismissing its case."¹

3. The Parties' Settlement Discussions Are Relevant Because They Suggest Ms. Kraft Has Not Acted In Good Faith.

The parties' settlement discussions do not offend ER 408 because they are not offered to prove Ms. Kraft's liability on the Guaranty. Cf. Matteson v. Ziebarth, 40 Wn.2d 286, 242 P.2d 1025 (1952) (evidence of compromise and offers of compromise admissible when offered for some purpose other than liability, such as to prove lack of good faith where good faith in issue) (cited in Comment 408 to ER 408).

The parties' settlement discussions are relevant because they bear on the circumstances of this particular case, in which Ms. Kraft seeks to

¹ Motion at 5.

recover from Wachovia her attorneys' fees and costs after a voluntary dismissal without prejudice. See, e.g., Walji v. Candyco, Inc., 57 Wn. App. 284, 290, 787 P.2d 946, 949 (1990) (The decision as to whether a particular voluntary nonsuit should trigger attorney fees should be left to the discretion of the trial judge in light of the circumstances of the particular case).

On April 30, 2008, Wachovia instructed its attorney to inform the Court as to the settlement discussions between the parties in order to better apprise the Court of the context and circumstances that led to this case. Wachovia maintains this Court must understand what Ms. Kraft did and did not do in the underlying proceedings, for it is Ms. Kraft who caused this case to be. Her actions and inactions in the proceedings below bear on her good faith — or lack thereof — which is relevant for the purpose of awarding or not awarding Ms. Kraft her costs and attorneys' fees.

4. Conclusion.

For these reasons, Wachovia respectfully asks the Court to supplement the record with the email correspondence attached as Exhibits A and B to Ms. Kraft's Motion and the correspondence attached hereto as Exhibit 1 and 2. Wachovia further asks the Court to deny said Motion insofar as it seeks any other relief.

RESPECTFULLY SUBMITTED this 9th day of May, 2008.

EISENHOWER & CARLSON, PLLC

By: Alex Kleinberg
Alexander S. Kleinberg, WSBA # 34449
Attorneys for Respondent
Wachovia S.B.A. Lending, Inc.

Certificate of Service

I, Deidre M. Turnbull, am a legal assistant with the firm of
Eisenhower & Carlson, PLLC, and am competent to be a witness herein.

On May 9, 2008, I caused a true and correct copy of the Response
to Motion for Leave to Respond, Strike Portions of Brief, and/or
Supplement Appellate Record to be served via email and via ABC Legal
Services, Inc. to:

Douglas N. Kiger
Blado Kiger, P.S.
3408 S. 23rd Street, 2nd Floor
Tacoma, WA 98405
doug@bladokiger.com

Harold T. Hartinger
906 6th Avenue, #C
Tacoma, WA 98405
hthartinger@harbornet.com

**FILED AS ATTACHMENT
TO EMAIL**

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 9th day of May, 2008, at Tacoma, Washington.

Deidre M. Turnbull
Deidre M. Turnbull

EXHIBIT 1

Kleinberg, Alexander S.

From: desa [desaconniff@beecherandconniff.com]
Sent: Wednesday, March 01, 2006 3:15 PM
To: Kleinberg, Alexander S.
Subject: Re: Kraft/Wachovia

Thank you for the reply. I am out of the office at a seminar the rest of the week, I will pass on the request for information to be brought to my office. Desa

----- Original Message -----

From: Kleinberg, Alexander S.
To: desa
Sent: Wednesday, March 01, 2006 2:35 PM
Subject: RE: Kraft/Wachovia

Desa:

I've relayed Mr. Kraft's \$16882.00 offer to my client. Wachovia tells me that the SBA gets final say over this offer given its amount. The SBA also needs to know where these settlement funds would come from. Further, I would like to obtain written verification of Ms. Kraft's mortgage balances. I'm also told once the SBA gets this additional information it will take a couple of days for them to decide how they want to proceed. Of course, that pushes us into next week, at the earliest.

In the meantime, I'm still planning on arguing the motion for summary judgment on Friday. Perhaps we will be able to agree on a settlement next week once I receive this additional information? In the event Ms. Kraft does not file bankruptcy and my client prevails on Friday, I doubt Wachovia would take issue with refraining from executing on a judgment for a week or so while we talk among ourselves & see if we can work something out...

Alex

From: desa [mailto:desaconniff@beecherandconniff.com]
Sent: Tuesday, February 28, 2006 9:30 AM
To: Kleinberg, Alexander S.
Subject: Kraft/Wachovia

Alex, I have received an original of the CMA. Thank you for seeing to that I received the same. Based on this CMA, which was produced by a Realtor of your client's choosing, I have prepared another liquidation analysis if Ms. Kraft were to file chapter 7 this week. I have attached the same to this email. The bottom line is that the liquidation analysis is based on 8.5% costs of sale, no provision for attorney fees or cpa fees as part of the costs of administration. The only deduction is for the chapter 7 trustee fees. The net amount, and maximum amount that Wachovia would receive at some point in the future would be \$ 16882.00. This is not a guaranteed amount as the house may not sell for this amount and may need

3/8/2006

repairs. Further, there may be additional expenses related to the administration of the case. Your client further would have to wait to be paid, whereas a settlement at this time would take all risks of recovery, as well as reducing your clients costs of recovery. At this time, my client is willing to settle at the \$ 16882.00 with terms to be discussed. I am aware that your motion is scheduled for this Friday. I am available today and Wednesday, but will be unavailable on Thursday or Friday. I have Ms. Kraft's petition prepared to file if we are unable to reach an agreement and if you are successful on your summary judgment. I look forward to hearing from you.

Desa Gese Conniff
732 Pacific Ave
Tacoma WA 98402
253-627-0132
253-572-3427 (fax)

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EXHIBIT 2

Law Offices of
BEECHER & CONNIFF

732 Pacific Avenue
Tacoma, Washington 98402
Telephone: (253) 627-0132
Fax: (253) 572-3427
desaconniff@beecherandconniff.com

William L. Beecher
Desa Gese Conniff
Legal Assistants
Katherine B. Suhr
Kristin E. Grantham

March 23, 2006

Sent by Facsimile Transmission

Alexander Kleinberg
1200 Wells Fargo Plaza
1201 Pacific Ave
Tacoma WA 98402

RE: Wachovia/Kraft Settlement Discussions

Dear Mr. Kleinberg:

I am in receipt of your letter dated March 23rd, 2006 wherein you indicate that Wachovia is willing to settle this matter for \$ 24,301.28. I find this offer intriguing as on March 17th, 2006, Wachovia accepted an offer of \$ 16,882.00 after that offer had been withdrawn.

I have spoken with my client regarding settling this matter. Ms. Kraft is considering appealing the hearing of March 20th. She understands her costs for such an appeal to be approximately \$ 5000.00. Ms Kraft has authorized me to offer Wachovia \$ 5000 to avoid the appeal and settle this matter once and for all. I further understand that there may be issues regarding statutes of limitation on Wachovia for the filing of a new complaint. Any new complaint filed will be hotly contested by Ms. Kraft and a request for attorney fees and costs will be renewed by her.

In light of the overall circumstances and my clients desire to end this squabble, she is offering \$ 5000.00 to be paid upon acceptance of the offer. I await your reply.

Very truly yours,



Desa Gese Conniff

**FILED AS ATTACHMENT
TO EMAIL**

C: Christine M. Kraft